BOARD OF ALIEN LABOR CERTIFICATION APPEALS
800 K STREET, N.W.
WASHINGTON, D.C. 20001-8002

DATE: March 21, 1997

CASE NO: 94-INA-591

In the Matter of:

MEDTRONIC, INC.,
Employer,

On Behalf of:

JEEVAMANOHARAN SEEVARATNAM,
Alien.

Appearance: Polly A. Maier, Esq. and Howard S. Myers, III, Esq.
Popham, Haik, Schnobrich & Kaufman, Ltd.
Minneapolis, Minnesota
for the Employer

Before: Neusner, Vittone, and Wood
Administrative Law Judges

PAMELA LAKES WOOD
Administrative Law Judge

DECISION AND ORDER

This case arose from an application for labor certification on behalf of Alien Jeevanamanoharan Seevaratnam ("Alien") filed by Employer Medtronic, Inc. ("Employer") pursuant to Section 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the "Act") and the regulations promulgated thereunder, 20 C.F.R. Part 656. The Certifying Officer ("CO") of the U.S. Department of Labor, Chicago, IL, denied the application and the Employer requested review pursuant to 20 C.F.R. § 656.26.

Under Section 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor ("Secretary") has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able,

willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed.

Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File ("AF"), and any written argument of the parties. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

On December 29, 1992, as amended, Employer filed an application for labor certification to enable the Alien, a Sri Lanka national, to fill the position of "Product Verification Technician." Two years of vocational training with a vocational technical degree in "Electronics or Electr. Tech.", as well as two years experience in the related occupation of "Computer-Aided Engineering Technician" were required. The job offered was described as:

> Product Verification position available in Product Support department of medical device company. Develop and configure hardware and software systems to perform quality control tests on existing and developing pacemaker lines; perform quality control tests using custom instrumentation; and interpretation of test data to determine pacemaker's anticipated function in the human body.

(AF 62). Special Requirements were:

> Requires two-year vocational degree in electronics or electronic technology, plus the following formal training, which may have been obtained during or after degree program: 10 hours' training in the use of electronic test equipment; 100 hours' training in data communications and operating system administration; completion of Basic and Advanced System Administrator training for SunO[S] 4.1 (or equivalent program). [Requirement for cardiovascular/pacemaker training deleted.] Also requires three years' experience in all of the following areas: developing and configuring systems for integrating and exchanging data between computer controlled test equipment and research PC/Unix (or equivalent) workstations data analysis environment; working with Computer-Aided Engineering/Computer-Aided Design (CAE/CAD) tools, Pro Engineer,

> CADDS, Prance Printed Circuit Board Design, PCAD or Cadence Schematic Capture using and maintaining both desktop and server Sun Microsystems SPARC computers and software (or equivalents); working with computer operating systems and user interfaces, including Unix, X-Windows, Open Windows, and Sunview; and configuring, installing, maintaining, and troubleshooting computer hardware, multi-protocol local and wide area networks including routers, bridges, ethernet hubs, dial in equipment, TCP/IP operating system software (including SunO[S]) and applications software. Requires two years' experience working with MS-DOS operating systems and Personal Computers in a networked environment. All experience may be concurrent.

(AF 64). An October 23, 1992 letter from the Employer's Brady IPG Product Development Director set forth the basis for each of the job duties and requirements. (AF 67-75).

A transmittal form from the state agency indicated that there were 13 applicants, none of whom were hired. (AF 59-61). However, the state agency noted:

> The employer does not meet the SVP for the position. The alien's qualifying experience was gained with the employer in what the employer feels is a distinctly different position. It is questionable whether an applicant from outside Medtronic could have amassed the specific set of criteria the employer requires.

(AF 60). The Employer's recruitment report and supplemental report indicated the basis for rejecting each of the applicants, primarily related to the specialized job requirements. (AF 84-87).

On January 28, 1994, the CO issued a Notice of Findings in which she notified the Employer of the Department of Labor's intention to deny the application on several bases, citing sections 656.20(c)(8), 656.21(b)(2)(i), and 656.21(b)(5) of title 20, Code of Federal Regulations. The CO specifically (1) noted that the 5-year combination of education and experience required exceeded the Specific Vocational Preparation (SVP) set forth for the position in the Dictionary of Occupational Titles (DOT); (2) stated that the specific requirements for the job appeared excessive and unduly restrictive, they were not justified by the Employer's reasons for business necessity, and it was unlikely an applicant from the outside could satisfy them; and (3) indicated that experience that an alien gains while employed in the occupation for which certification is being sought cannot be required of other applicants, and any requirements that the alien gained on the job should be deleted. (AF 93-95).

The Employer submitted its rebuttal through the February 28 and March 1, 1994 letters of its attorney and the Brady IPG Product Development Director and

attachments. The Employer argued that it had established business necessity for the combination of experience, training and vocational education, and for each of the technical areas in which experience and training were being required; and that the experience the alien obtained with the Employer was in a completely different job (CAE/CAD Technician.) (AF 38-54).

On July 6, 1994, the CO issued a Final Determination finding the Employer's rebuttal unsatisfactory. The CO found that the Employer had failed to justify exceeding the SVP level or the need for the excessive requirements in item 15 of the application, that the alien was not qualified because the Employer had not shown that he acquired the experience in a job other than the subject job, and that a bona fide job offer does not appear to exist. (AF 35-37).

The Employer, through its attorney, requested review of that denial on August 1, 1994. (AF 1-5). A timely brief was submitted by letter of September 30, 1994.

DISCUSSION

In denying the application, the CO relied upon sections 656.20(c)(8), 656.21(b)(2)(i), and 656.21(b)(5) of title 20, Code of Federal Regulations.

Section 656.20(c)(8) requires that an employer attest that the job opportunity has been and is clearly open to any qualified U.S. worker. ***See*** 20 C.F.R. § 656.20(c)(8). "Job opportunity" is defined as "a job opening for employment at a place in the United States to which U.S. workers can be referred." 20 C.F.R. § 656.3. Although the words "bona fide job opportunity" do not appear in the regulations, the regulations have been administratively interpreted to include this requirement, ***Modular Container Systems, Inc.,*** 89-INA-228 (July 16, 1991) (***en banc***), ***citing Pasadena Typewriter and Adding Machine Co., Inc. et al. v. U.S. Dept. of Labor,*** No. CV 83-5516-AABT (C.D. Cal. 1987). A job is not clearly open to U.S. workers and there is no bona fide job opportunity when the job is tailored to meet the alien's qualifications. ***See 100 Plaza Clinical Lab,*** 93-INA-288 (Aug. 17, 1994). Under the "totality of circumstances" test, various factors relating to ownership and control are used to determine whether a job is clearly open to any U.S. worker. ***Modular Container Systems, Inc.,*** 89-INA-228 (July 16, 1991) (***en banc***) (discussing factors).

Section 656.21(b)(2)(i) requires a showing of business necessity for requirements that are not normal for jobs in the United States or that are not defined for the job in the Dictionary of Occupational Titles. ***See, e.g., Ivy Cheng,*** 93-INA-106 (June 28, 1994); ***A-Transmission Discount,*** 88-INA-118 (March 27, 1990); ***Manuel Reyes***, 89-INA-89 (Nov. 29, 1989). In order to establish business necessity under section 656.21(b)(2)(i), an employer must demonstrate that the job requirements (1) bear a reasonable relationship to the occupation in the context of the employer's business and (2) are essential to perform, in a reasonable manner, the job duties as

described by the employer. ***In re Information Industries, Inc.***, 88-INA-82 (Feb. 8, 1989) (***en banc***). The first prong of this test is always satisfied with respect to a requirement that there be experience in the job offered, but the second prong requires a determination to be made. ***See National Institute for Petroleum and Energy Research,*** 88-INA-535 (March 17, 1989) (***en banc***); ***Sung Sportswear, Inc.,*** 94-INA-491 (April 7, 1995).

Section 656.21(b)(5) requires documentation that the requirements for the job opportunity are the employer's actual minimum requirements and the employer has not hired employees with less experience or that it is not feasible to hire workers with less training or experience. This provision is usually cited when the Alien obtained his or her qualifying experience in a substantially similar job with the employer. ***See, e.g., Delitizer Corp. of Newton,*** 88-INA-482 (May 9, 1990) (***en banc***), ***on remand***, 91-INA-53 (July 2, 1991); ***Singletary Auto Body,*** 94-INA-55 (Dec. 21, 1994); ***Cornucopia 1515, Inc.***, 92-INA-85 (May 15, 1992); ***Delaney's Restaurant,*** 88-INA-174 (Oct. 30, 1991).

Turning first to the issue of whether there was a bona fide job opportunity open to any qualified U.S. worker, the factors to be considered under the "totality of circumstances" test to determine whether a job is clearly open to any U.S. worker, set forth in ***Modular Container Systems, Inc.,*** 89-INA-228 (July 16, 1991) (***en banc***), are whether the alien: (1) is in a position to control or influence hiring decisions regarding the job for which labor certification is sought; (2) is related to corporate directors, officers or employees; (3) was an incorporator or founder of the company; (4) has an ownership interest in the company; (5) is involved in the management of the company; (6) is on the board of directors; (7) is one of a small number of employees; (8) has qualifications for the job identical to specialized or unusual job duties and requirements stated in the application; and (9) is so inseparable from the sponsoring employer because of his or her pervasive presence or attributes that the employer would be unlikely to continue in operation without the alien. Also considered in the "totality of circumstances" standard is the employer's level of compliance and good faith in processing the application and whether the business was created for the sole purpose of obtaining certification for the alien.

Here, there was no job opportunity open to U.S. workers as required by 20 C.F.R. § 656.20(c)(8) when the totality of circumstances are considered. While the Alien does not appear to be involved in the control or ownership of the Employer’s business, it is clear that he has qualifications for the job identical to specialized or unusual job duties and requirements stated in the application. It is not surprising that the Employer was unable to find U.S. workers who were qualified under the job duties and requirements specified in the application as these criteria are so closely tailored to those of the Alien that it would be unlikely that anyone else would qualify or, if possessing such rare qualifications, would be interested in the position of “Technician.” Here, although the Employer has gone through the motions of the labor certification

process, it is clear that the Employer is not interested in hiring anyone but the Alien. The Employer has not convincingly demonstrated that the precise qualifications possessed by the Alien are the only ones that would enable a worker to perform the job.

Second, turning to section 656.21(b)(2)(i), which requires a showing of business necessity for requirements that are not normal for jobs in the United States or that are not defined for the job in the Dictionary of Occupational Titles, we are unable to agree that the showing has been made. The Employer has shown that its preference is that the worker selected have two years of experience and two years of vocational education, which is above that provided for in the DOT, and has clearly shown that the specialized requirements are job related, thereby satisfying the first prong of the ***Information Industries*** test. However, the Employer has not shown that these requirements "are essential to perform, in a reasonable manner, the job duties as described by the employer," as required by the second prong of the ***Information Industries*** test.

Third, the Employer has failed to document, as required by Section 656.21(b)(5), that the requirements for the job opportunity are the employer's actual minimum requirements and the employer has not hired employees with less experience or that it is not feasible to hire workers with less training or experience. While the Employer has extensively addressed the issue of whether the position currently filled by the Alien and the job opportunity itself are different positions, the Employer has not indicated that anyone else hired for this particular position in the past had the particular, unusual experience requirements it is now seeking in an applicant, nor has it certified that it is not feasible for it to hire U.S. workers and train them (as it did for the Alien in the position he currently holds.)

While the Employer here has certainly made an impressive effort to show it has technically complied with the applicable requirements, what we find more compelling is that the Employer appears to have no interest in seeking or finding qualified U.S. workers, because it has so closely tailored its requirements to those possessed by the Alien. There was apparently never any intention to consider anyone but the Alien for the job opportunity.

In view of the above, the application for labor certification should be denied.

ORDER

The Certifying Officer's denial of labor certification is hereby AFFIRMED.

For the Panel:

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PAMELA LAKES WOOD
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.

BALCA VOTE SHEET

Case Name: Medtronic, Inc.
(Alien: J. Seevaratnam)

Case No. : 94-INA-591

PLEASE INITIAL THE APPROPRIATE BOX.

	CONCUR	DISSENT	COMMENT
Vittone			
Huddleston			

Thank you,

Judge Wood

Date: